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Recent Developments in Minnesota Law

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RECENT DEVELOPMENTS IN MINNESOTA LAW

Constitutional: MINNESOTA RECOGNIZES A RIGHT OF PRIVACY: *State v. Gray*, 413 N.W.2d 107 (Minn. 1987).

I. INTRODUCTION

The United States Supreme Court recently held that the right of privacy embodied in the Federal Constitution does not protect those who engage in homosexual sodomy.[1] The Court upheld the constitutionality of the Georgia sodomy statute which makes it an offense to engage in sodomy regardless of the sex or consent of the partner.[2] In a case challenging the constitutionality of a similar statute, the Minnesota Supreme Court in *State v. Gray*[3] explicitly recognized that the right of privacy exists in the Minnesota Bill of Rights.[4] The court held, however, that the right of privacy does not extend to include those who engage in "commercial sex."[5] *Gray* represents an important decision for the court because it opens the issue of whether the newly found right of privacy under the Minnesota Bill of Rights is broader in scope than the right of privacy found under the United States Constitution. The Minnesota Supreme Court left unanswered the question of whether the right of privacy in the Minnesota Bill of

1. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). This decision was immediately criticized for singling out the aspect that Hardwick was a homosexual. The Court justified its decision that the Georgia sodomy statute did not violate the fundamental rights of homosexuals on the basis that fundamental rights are those "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition." *Id.* at 2844. The Court held that fundamental rights include only those bearing on family, marriage, or procreation. *Id.*

2. *Id.* at 2846. The Georgia statute provides in pertinent part:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

3. 413 N.W.2d 107 (Minn. 1987).

4. The court stated, "[a] comparison of the Minnesota Bill of Rights with the federal constitutional provisions upon which the right of privacy is founded shows that the rights protected by the Federal Constitution are also protected by the Minnesota Bill of Rights." *Id.* at 111.

5. *Id.* at 114. Although Gray denied paying for sex with the complainant, the court felt there was adequate evidence to show that the offense was commercial sex.

Rights protects the right of homosexual or heterosexual couples to engage in sodomy, an argument which the United States Supreme Court rejected in *Bowers v. Hardwick*. The Minnesota Supreme Court did not address whether the right to privacy extends to privacy rights recognized in *Griswold v. Connecticut*[6] and *Roe v. Wade*[7].

II. *BOWERS V. HARDWICK*

In *Bowers v. Hardwick*[8] the United States Supreme Court distinguished prior opinions and concluded that the Federal Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy."[9] Homosexual activity was completely unrelated to the constitutionally protected areas of family, marriage, and procreation.[10] The Court found that, unlike traditionally protected rights, homosexual sodomy was not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[11] Furthermore, the Court rejected the assertion that Hardwick's conduct, committed in the privacy of his own home, deserved special protection under the analysis used in *Stanley v. Georgia*.[12] According to the Court, the rights at issue in *Stanley* stemmed from the text of the first amendment, which bore no indication to the right to engage in sodomy.[13] The same dual right of privacy argument, the right of privacy in personal decisions and the right of privacy in particular places,[14] was argued by the plaintiff in *Gray*.

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6. 381 U.S. 479 (1965). In *Griswold* a statute banning the use of contraceptives was ruled unconstitutional as applied to married couples. The *Griswold* decision produced two rules. First, the marital bedroom is off limits to state regulation. Second, any statute which can only be enforced by pillaging the same bedroom is unconstitutional. *Id.* at 485-86.

7. 410 U.S. 113 (1973) (right of privacy extends to a woman's decision whether or not to have an abortion).

8. 106 S. Ct. 2841 (1986).

9. *Id.* at 2843.

10. The court also stated that "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Id.* at 2844 (citing Carey v. Population Serv. Int'l, 431 U.S. 678, 688 n.5, 694 n.17 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

11. *Bowers*, 106 S. Ct. at 2844. To the contrary, the Court found a long tradition of prohibiting homosexual sodomy which stretched back to the English Reformation and Roman criminal codes. *Id.* at 2847 (Burger, C.J., concurring).

12. 394 U.S. 557 (1969). In *Stanley*, the Court held that the first amendment prevents convictions for reading or keeping obscene material in one's own home. In general, illegal conduct is not always protected when it is carried out in the home, such as using drugs, or possessing firearms, or committing sexual crimes. *Id.* at 568.

13. *Bowers*, 106 S. Ct. at 2846.

14. *See id.* at 2850-51 (Blackmun, J., dissenting) (citing Roe v. Wade, 410 U.S. 113 (1973) (privacy interests in making certain decisions); United States v. Karo, 468 U.S. 705, 714 (1984) (right of privacy in private residence)).

III. *STATE V. GRAY*

In *State v. Gray*, the complainant was arrested by the police in connection with a boat theft from Gray's house.[15] The complainant, a sixteen-year old boy,[16] made two statements to the police in which he stated that he had three sexual contacts with Gray, for which he was paid varying amounts of money.[17] Gray also voluntarily gave a statement to the police. He admitted that he met the complainant while driving near Loring Park in Minneapolis, but claimed that he had sex with him on only one occasion.[18] In his statement, Gray admitted giving the money to the complainant but considered it a loan not a payment for sex.[19] Based on his admissions, Gray was charged with criminal sodomy under Minnesota Statute section 609.293.[20]

Gray moved to dismiss the charge on the ground that section 609.293, subdivision 5 was unconstitutional and violated his right of privacy, as protected by the United States Constitution and the Minnesota Constitution.[21] Subsequently, the United States Supreme Court decided *Bowers* which erased Gray's argument that the Minnesota statute violated his right to privacy guaranteed by the United States Constitution.[22]

The trial court dismissed the complaint holding that the Minnesota statute was "unconstitutionally broad and infringes upon the right of privacy granted by the Minnesota Constitution on its face

15. *Gray*, 413 N.W.2d at 108. The complainant was arrested during an investigation of two boat thefts.

16. Since the complainant informed Gray that he was 18 years old at the time and Gray reasonably assumed that he was an adult, the complainant was considered a consenting adult. *Id.* at 113 n.5. Gray was particularly concerned about the age of the complainant because Gray was on probation for a conviction for committing fellatio with a boy between the age of 13 and 16. *Id.*

17. The complainant gave conflicting statements to the police concerning the amounts of money received and the dates of sexual contact. He changed the dates because he did not want it known he was engaging in prostitution after May, 1985, as he had a previous charge of prostitution in May of that year. The discrepancy in money was attributed to drinking. *Id.* at 108-09.

18. *Id.*

19. *Id.*

20. Minnesota Statute section 609.293 provides in pertinent part:

> Subdivision 1. Definition. "Sodomy" means carnally knowing any person by the anus or by or with the mouth. . .
>
> * * *
>
> Subdivision 5. Consensual acts. Whoever, in cases not coming within the provisions of sections 609.342 or 609.344, voluntarily engages in or submits to an act of sodomy with another may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

MINN. STAT. § 609.293 (1984).

21. *See Gray*, 413 N.W.2d at 109-110 (right of privacy challenge as applied).

22. *Id.* at 110.

and as applied to [Gray]."[23] The state then appealed to the Minnesota Supreme Court which granted the state's petition for accelerated review.[24]

Upon review, the supreme court compared the Minnesota Bill of Rights with the Federal Constitution and found the same rights of privacy embodied in the Federal Constitution present in the Minnesota counterpart.[25] Although the Minnesota Supreme Court had previously recognized the right of privacy, it had never "rooted that right in the Minnesota Constitution."[26]

Having recognized the right to privacy, the court stated:

> We are not limited by United States Supreme Court decisions . . . the protection we afford cannot be less than that afforded by the Federal Constitution, but it is equally certain that we can afford more protection under our constitution than is afforded under the Federal Constitution.[27]

Furthermore, the court stated they were not restricted in finding only those fundamental rights "expressly stated in our Constitution."[28]

Disagreeing with the trial court, the supreme court found that Gray lacked standing "to champion the causes of others in situations not before [the] court."[29] Gray argued that he had standing based on the impact the case would have on third party rights[30] and the exception regarding first amendment rights which allows persons to champion third party rights where those rights are at issue.[31] The court rejected both arguments; with respect to the first argument, the court found that third parties' rights were not so directly affected by the litigation that Gray should be allowed standing to challenge the statute as facially overbroad.[32] The court then found the first amendment issue of freedom of association was not reached because "the first amendment overbreadth doctrine is 'strong medicine' to be

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23. *Id.*

24. *Id.*

25. *Id.* at 111.

26. *Id.* at 110 (citing Minnesota State Board of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976), *appeal dismissed*, 429 U.S. 803; Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976)).

27. *Id.* at 111.

28. *Id.*

29. *Id.* at 112.

30. *Id.*

31. The party in court has standing to challenge "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible to application to protected expression." *Id.* at 113 (citing Koppinger v. City of Fairmont, 311 Minn.186, 200, 248 N.W.2d 708, 716 (1976)).

32. *Id. See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

employed with hesitation and, then 'only as a last resort.' "[33]

The issue then boiled down to whether "the sodomy statute, as applied to Gray in this case, unconstitutionally violates the right of privacy."[34] The supreme court found the sodomy statute constitutional as applied to Gray based on the certainty that the sodomy occurred as a result of a pay-for-sex relationship.[35] The court felt sexual conduct with a prostitute was "public" whereas the right to privacy only protected "private" sexual conduct between consenting adults.[36] Gray's relationship with the complainant was "public" sexual conduct in character since the two did not know each other, and Gray paid for the sex.[37] Although Gray argued it was sexual conduct in the privacy of his own home, Chief Justice Amdahl focused on the fact that the conduct was prostitution, stating, "It is simply wrong to say that the sexual conduct in this case became private once the bedroom door was closed."[38] Also, the sexual conduct committed by Gray was "public" in nature because prostitution is negotiated in public and because it carried a risk to the public of veneral disease and criminal activity.[39] Since the facts supported a charge of prostitution,[40] the court refused to extend a right of privacy to protect individuals like Gray, who engage in sodomous "commercial sex."[41] To extend the right of privacy to protect those in a sex-for-compensation relationship would "debase both the Constitution and the concept of fundamental rights."[42]

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33. *Id.* at 113 (citing New York v. Ferber, 458 U.S. 747, 769 (1982)).

34. *Id.*

35. In State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1965), the court mentioned in dicta that "[w]hether a female is a 'public Prostitute' is of no moment in a sodomous act." *Id.* at 91, 139 N.W.2d at 809. This does not coincide with what the court held in *Gray* where the statute is applicable primarily because the consenting partner is a prostitute. 413 N.W.2d at 114.

36. The court tried to inject the word "public" into the phrase "private sexual conduct" used by Gray. To do so seems misplaced because, although negotiated in public, the sexual act is carried out in private. Furthermore, the charge of prostitution provides an offense for the act of selling sex, where the "commercial" portion of the "transaction" is carried out in public.

37. *Id.* at 113-14.

38. *Id.* at 114.

39. *Id.* It is interesting to note the similarity of the Minnesota court's justification for finding Gray's conduct "public" and the state of Georgia's justification for its sodomy statute. In its brief, the state argued in *Bowers* that sodomy may have "serious adverse consequences 'for the general public health and welfare,' such as communicable diseases or fostering criminal activity." *Bowers*, 106 S. Ct. at 2846, 2853 (Blackmun, J., dissenting) (citing Brief for Respondent).

40. 413 N.W.2d at 114.

41. *Id.*

42. *Id.*

IV. CONCLUSION

In *Gray*, the court recognized a right of privacy in the Minnesota Constitution, but apparently distinguished the issue in *Gray* from that asserted in *Bowers*. Although refusing to define the right of privacy as narrowly as the United States Supreme Court, the Minnesota Supreme Court found the issue in *Gray* to be "public" consensual sodomy in the form of "commercial sex," as opposed to *Bowers*, where the conduct was clearly of a private nature. The Minnesota Supreme Court neatly sidestepped the issue of whether the right to privacy protects private non-commercial sex engaged in by consenting heterosexual and homosexual couples. One can imply from the decision that the reason the court did not address the issue was its unwillingness to let the Minnesota Constitution protect an admitted sex offender.

Finally, the court's analysis bears resemblance to that used in *Stanley*, which recognized that the right of privacy under the Federal Constitution does not protect "victimless crimes" committed in the home such as possession of stolen property, drugs or firearms.[43] If prostitution is a "victimless crime" as explained in *Stanley*, Gray's sexual conduct would not be protected under the right of privacy. It is not clear in *Stanley*, however, whether that particular crime must be what is at issue in the case to justify such an analysis. Since the charge of prostitution was not the issue in *Gray*, nor was it absolutely proven, the court may have refrained from actually basing its decision on *Stanley*.[44] Instead, the court formulated the "commercial sex" distinction to find Gray's conduct unprotected. The court did offer encouragement, however, to a later challenge to the Minnesota sodomy statute by holding that the Minnesota Constitution does confer a right of privacy.[45]

Torts: MINNESOTA REJECTS THE "ALTERNATIVE DESIGN" TEST IN PRODUCTS LIABILITY LAW: *Kallio v. Ford Motor Co.*, 407 N.W.2d 92 (Minn. 1987).

I. INTRODUCTION

The Minnesota courts have long recognized that the plaintiff in a strict products liability case has the burden of establishing that the

43. Stanley v. Georgia, 349 U.S. 557, 568 n.11.
44. *Id.*
45. *Gray*, 413 N.W.2d at 114.

defendant's product was defective and unreasonably dangerous.[1] Cases involving an alleged design defect are judged by the reasonable-care balancing test adopted by the Minnesota Supreme Court in *Holm v. Sponco Manufacturing, Inc.*[2] This test states:

> [A] manufacturer is obligated to exercise that degree of care in his plan or design so as to avoid any unreasonable risk of harm to anyone who is likely to be exposed to the danger when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.
>
> What constitutes "reasonable care" will, of course, vary with the surrounding circumstances and will involve "a balancing of the likelihood of harm, and the gravity of harm if it happens, against *the burden of the precaution which would be effective to avoid the harm.*"[3]

The express language of this test requires evidence of a "precaution which would be effective to avoid the harm."[4] It also requires a showing of the "burden" associated with the potential adoption of that precaution.[5] This test clearly refers to the necessity of proof of an alternative feasible safer design.[6] Those courts applying the reasonable-care balancing test have traditionally placed the burden of

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1. In Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426 (1971), the Minnesota Supreme Court adopted strict liability as a theory of recovery in products liability. The elements that the plaintiff must establish are: (1) that the defendant's product was in a defective condition unreasonably dangerous for its intended use; (2) that the defect existed when the product left the defendant's control; and (3) that the defect was the proximate cause of the injury sustained. *Id.* at 329, 188 N.W.2d at 432.

2. 324 N.W.2d 207 (Minn. 1982).

3. *Id.* at 212 (quoting Micallef v. Miehle Co., 39 N.Y.2d 376, 385-86, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976)) (emphasis added). *See also* Wilson v. Piper Aircraft Corp., 282 Or. 61, 66, 577 P.2d 1322, 1325-26, *reh'g denied*, 579 P.2d 1287 (1978). In design defect products liability cases, the Oregon Supreme Court also requires the court or trier of fact to balance the utility of the product's risk against its magnitude when deciding whether to submit the question of a design defect to the jury. *Id.* at 66, 577 P.2d at 1326.

4. The reasonable-care balancing test was originally enunciated in *Micallef*, 39 N.Y.2d at 385-86, 348 N.E.2d at 577-78, 384 N.Y.S.2d at 121. *Micallef* involved a products liability design defect claim where the plaintiff's hand was injured while operating a photo-offset press machine manufactured and sold by Miehle-Gross Porter, Inc. The court held that the reasonable-care balancing test was the proper standard to follow in determining whether the photo-offset press machine was defectively designed. *Id.*

5. *Id.*

6. In *Micallef*, the court stated that "[u]nder this approach, [the reasonable-care balancing test], 'the plaintiff endeavors to show the jury such facts as that competitors used the safety device which was missing here, or that a cotter pin costing a penny could have prevented the accident.' " *Id.* at 386, 348 N.E.2d at 578, 384 N.Y.S.2d at 121. In a subsequent design defect products liability case, the same court declared: "The plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." Voss v. Black &

proof on the plaintiff to establish an alternative feasible safer design.[7] Without such evidence, the test cannot be properly performed. Yet, the Minnesota Supreme Court, in *Kallio v. Ford Motor Co.*,[8] applied this balancing test without requiring the plaintiff to prove the existence of an alternative feasible safer design.[9] As this Casenote shall demonstrate, however, the *Kallio* court's application of the reasonable-care balancing test was clearly erroneous and should be rectified.

II. FACTS OF *KALLIO*

In *Kallio*, the accident giving rise to the products liability claim occurred in September of 1978.[10] Robert Kallio was driving his 1977 Ford F-150 pickup truck home from work when it suddenly began to rain.[11] Kallio pulled to the side of the road intending to get out of the cab and cover some tools in the bed of the truck.[12] He stopped the truck and shifted the automatic transmission lever into park.[13] He did not set the parking brake nor did he shut the engine off.[14]

Kallio jumped on the rear bumper to cover the tools and noticed that the truck was moving in reverse.[15] He then ran back to the truck's cab and tried to re-enter the vehicle, but slipped on the pavement and fell.[16] The truck rolled over Kallio, injuring his legs and a hand.[17]

Kallio brought suit against Ford, claiming that the design of the truck's automatic transmission shifting mechanism was defective.[18] Ford argued that Kallio failed to meet his burden of proof because

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Decker Mfg. Co., 59 N.Y. 2d 102, 108, 450 N.E.2d 204, 208, 463 N.Y.S.2d 398, 402 (1983).

7. *See infra* notes 34-37 and accompanying text.

8. 407 N.W.2d 92 (Minn. 1987).

9. The *Kallio* court held that the "existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case." *Id.* at 97.

10. *See* Kallio v. Ford Motor Co., 391 N.W.2d 860, 861 (Minn. Ct. App. 1986). The plaintiff purchased the vehicle in 1977. It was equipped with a C-6 automatic transmission and a gearshift selector lever mounted on the steering column. Brief for Appellant at 4, Kallio v. Ford Motor Co., 407 N.W.2d 92 (Minn. 1987) C4-85-2126.

11. *Id.*

12. *Kallio*, 407 N.W.2d at 94.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* A passenger sitting in the cab succeeded in stopping the vehicle after Kallio was injured.

18. Kallio also claimed that the truck was defective because Ford failed to warn of the potential dangers arising from operator misuse. *Id.* at 93-94.

he did not show that a safer alternative design was feasible at the time of manufacture.[19] Accordingly, Ford contended that the plaintiff could not logically recover on the basis of a design defect.[20] The jury, however, concluded that the truck was defective.[21] The court of appeals affirmed.[22] The Minnesota Supreme Court, in affirming the court of appeals, held that it was not necessary for the plaintiff to establish evidence of an alternative feasible safer design in a strict product liability case based on an alleged design defect.[23]

III. The Reasonable-Care Balancing Test

In *Holm v. Sponco Manufacturing, Inc.*, the Minnesota Supreme Court adopted the reasonable-care balancing test in order to determine whether a design defect existed in the product.[24] In *Holm*, the plaintiff was severely injured while operating an aerial ladder manufactured by the defendant when he came in contact with a high-voltage power line.[25] In determining whether the manufacturer was liable, the court abandoned the latent-patent rule,[26] and embraced the reasonable-care balancing test, which was originally enunciated by the New York Court of Appeals in *Micallef v. Miehle Co.*[27]

Micallef was a product liability action in which the plaintiff alleged that the manufacturer negligently designed its product.[28] In determining whether the manufacturer exercised the appropriate degree of care in the design of the product, the court stated, "What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve a balancing of the likelihood of harm, and the gravity of the harm if it happens, against the burden of the

19. *Id.* at 96.

20. *Kallio*, 391 N.W.2d 860, 863 (Minn. Ct. App. 1986).

21. The jury in *Kallio* was not asked to separately determine whether the defect in the Ford truck was a design defect in the parking system or a failure to give an adequate warning. *Kallio*, 407 N.W.2d at 94 n.2. The jury instruction stated in part: "Was the 1977 Ford pickup defective and unreasonably dangerous to the users, with respect to the Park System?" *Id.* at 94.

22. *Kallio*, 391 N.W.2d at 865.

23. *Kallio*, 407 N.W.2d at 97.

24. *See* Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982).

25. *Id.* at 208.

26. *Id.* at 213. *Holm* overruled Halvorson v. American Hoist & Derrick Co., 307 Minn. 48, 240 N.W.2d 303 (1976), which had provided that a manufacturer would not be liable to an injured plaintiff if the risk was obvious, known by all involved, and was specifically warned against. *Id.* at 57, 240 N.W.2d at 308. *See also* Comment, *Obviousness of Product Dangers as a Bar to Recovery: Minnesota Apparently Adopts the Latent-Patent Doctrine*, 3 Wm. Mitchell L. Rev. 241 (1977).

27. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115. *See also supra* note 4 and accompanying text.

28. *See Micallef*, 39 N.Y.2d at 374, 348 N.E.2d at 573, 384 N.Y.S.2d at 117.

precaution which would be effective to avoid the harm."[29]

The same court later stated that "[t]he plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner."[30] It is therefore clear that the court from which Minnesota adopted the reasonable-care balancing test requires the plaintiff to present evidence of an alternative feasible safer design as part of its prima facie case.[31]

Other jurisdictions which use a similar balancing test also require the plaintiff to establish evidence of a safer product design which is both technologically feasible and practicable. The Nebraska Supreme Court has held that a plaintiff must show that there was some practicable way in which the design could have been made safer in order to prove that the product was defectively designed.[32] In Maryland, the court of special appeals has stated that in order to carry a case to the jury, the plaintiff must produce evidence which will show the technological feasibility of manufacturing a product with a safer design at the time the suspect product was manufactured.[33] Also, the Oregon Supreme Court has declared that if a defendant is to be found liable for an alleged design defect, then the plaintiff's prima facie case "must show more than a technical possibility of a safer design."[34] Other courts also require the plaintiff to provide evidence of an alternative, feasible safer design.[35]

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29. *Id.*

30. *Voss*, 59 N.Y.2d at 108, 450 N.E.2d at 208, 463 N.Y.S.2d at 402 (1983). The *Voss* court further stated that the defendant manufacturer may also present evidence in order to refute plaintiff's claim that the product was not safe due to its defective design. It is then up to the jury to weigh all the evidence and balance the product's risk against its utility and cost. *Id.*

31. In both *Micallef* and *Voss*, the New York Court of Appeals clearly stated that under the reasonable-care balancing test, the plaintiff must present evidence of an alternative feasible safer design.

32. *See* Nerud v. Haybuster Mfg., Inc., 215 Neb. 604, 613, 340 N.W.2d 369, 375 (1983).

33. *See* Troja v. Black & Decker Mfg., Inc., 62 Md. App. 101, 109, 488 A.2d 516, 518 (1985).

34. *See Wilson*, 282 Or. at 66, 577 P.2d at 1326.

35. *See* Huddell v. Levin, 537 F.2d 726, 737 (3d Cir. 1976) ("in establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances"); Baker v. Chrysler Corp., 55 Cal. App. 3d 710, 127 Cal. Rptr. 745, 749 (1976) (required injured plaintiff to show alternative designs for the product since plaintiff always has the burden to prove the existence of the defect); McClelland v. Chicago Transit Authority, 34 Ill. App. 3d 151, 340 N.E.2d 61 (1975). In *McClelland*, the court stated:

> In order to impose strict liability for defective design, the plaintiff must establish that the product has not lived up to the required standard of safety .... The standard of proof necessary is that (1) the product as designed is incapable of preventing the injury complained of; (2) there existed an alter-

IV. THE *KALLIO* DECISION

The *Kallio* court was faced with the issue of whether a plaintiff in a strict product liability case, based on an alleged design defect, must establish that at the time of manufacture an alternative feasible safer design existed.[36] Minnnesota requires that a plaintiff in a strict products liability case establish that the product was both unreasonably dangerous and in a defective condition.[37] And, as the *Kallio* court correctly noted, "the plaintiff ordinarily has the burden of showing the existence of an alternative design that was safer."[38] Further, when the court examined the history of Minnesota's design defect cases, it discovered that "as a practical matter, successful plaintiffs, almost without fail, introduce evidence of an alternative safer design."[39] Yet in spite of these well-established persuasive precedents and the rulings in accord from numerous other jurisdictions, the *Kallio* court chose a most disappointing and fallacious path in declaring that a plaintiff is not required to show proof of an alternative feasible safer design in design defect cases.

V. RAMIFICATIONS OF *KALLIO*

In light of the *Kallio* court's pronouncement regarding alternative designs, the application of the reasonable-care balancing test can only be illusory at best.[40] As has been noted, both a strict literal interpretation and a practical application of the reasonable-care balancing test require the production of evidence of an alternative feasible safer design.[41] Absent such evidence, the balancing required by the test cannot possibly be accurately performed.[42] Thus, the *Kallio* decision appears to deal a critical blow to the court's purported use of the reasonable-care balancing test in strict product liablility claims based on alleged design defects.

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native design which would have prevented the injury; and (3) in terms of cost, practicability and technological possibility, the alternative design was feasible.

Id. at 153, 340 N.E.2d at 63.

36. This would require plaintiff to present sufficient evidence of an alternative feasible safer design of the product at the time it was originally sold. Absent such evidence, the plaintiff would not be able to make a prima facie design defect case. *Kallio*, 407 N.W.2d at 95.

37. *See supra* note 1.

38. *Kallio*, 407 N.W.2d at 96.

39. *Id.* at n.6.

40. "[B]y its very terms, the [test] requires evidence of a 'precaution which would be effective to prevent the harm,' as well as evidence of the 'burden' associated with that precaution." Brief for Appellant, *supra* note 10, at 13.

41. *See supra* notes 30-35 and accompanying text.

42. *Id.*

Torts: DUAL CAPACITY EXCEPTION UNLIKELY IN MINNESOTA: *Egeland v. State,* 408 N.W.2d 848 (Minn. 1987).

I. INTRODUCTION

The exclusive-remedy provision of a workers' compensation statute generally acts as a bar to all common law claims by an employee against an employer for work-related injuries.[1] In Minnesota, this provision states in pertinent part: "The liability of an employer prescribed by this chapter is exclusive and in the place of any other liability to such employee, personal representative, surviving spouse, parent, any child, dependent, next of kin, or other person entitled to recover damages on account of such injury or death."[2]

Under a workers' compensation statute, an employee gives up the right to pursue a common law remedy for an employment-related injury or death.[3] The employee, however, gains the advantage of a guaranteed or almost guaranteed recovery of workers' compensation benefits.[4] The statute presupposes that certainty of benefits is preferred to the common law remedy an injured employee may have against an employer.[5] On the other hand, an employer under the statute is liable to pay workers' compensation benefits regardless of fault.[6] In exchange, the employer is protected from the risk of a potentially large damage verdict.[7]

Recently, several jurisdictions have recognized certain limited exceptions to the exclusive-remedy provision.[8] These exceptions are based on the principle that there are circumstances under which an

1. *See* Comment, *Workmen's Compensation and Employer Suability: The Dual-Capacity Doctrine*, 5 ST. MARY'S L.J. 818, 818-19 (1974).

2. MINN. STAT. § 176.031 (1986).

3. *Id.*

4. *See* Note, *Workers' Compensation: The Dual-Capacity Doctrine*, 6 WM. MITCHELL L. REV. 813, 814 (1980) [hereinafter *Workers' Compensation*]. "Under workers' compensation statutes, the employee has sacrificed the sometimes uncertain common-law remedy for employment-related injuries in return for almost certain recovery of workers' compensation benefits regardless of employer fault." *Id.* at 813-14. *See also* Note, *Dual-Capacity Doctrine: Third-Party Liability of Employer-Manufacturer in Products Liability Litigation*, 12 IND. L. REV. 553, 556-57 (1979) [hereinafter *Dual-Capacity Doctrine*] (the employee is also advantaged by the fact that recovery under the statutory scheme is usually much quicker and avoids the often excessive cost of a potentially unsuccessful lawsuit).

5. *See* Lauer v. Tri-Mont Coop. Creamery, 287 Minn. 221, 225, 178 N.W.2d 248, 251 (1970).

6. *See* Brief for Appellant at 11, Egeland v. State, 408 N.W.2d 848 (1987) C8-86-1586.

7. *Id.*

8. *See infra* notes 9, 14 and accompanying text.

employer should not be protected from common law liability by the exclusive-remedy provision.

II. The Exceptions

The Minnesota Supreme Court has recognized one exception to the exclusive-remedy provision in the case of *Boek v. Wong Hing*.[9] In *Boek*, the plaintiff-employee was beaten and assaulted by the defendant-employer.[10] The employer hit the plaintiff with a heavy broom handle and dislocated two of plaintiff's fingers.[11] The *Boek* court recognized the first exception to the exclusivity provision, which is now referred to as the "intentional tort exception."[12] The policy behind this exception is that one who consciously and deliberately intends to inflict injury should not be able to avoid damages by hiding behind the Workers' Compensation Act.[13]

Other jurisdictions have adopted the "dual capacity" exception to the exclusivity provision.[14] This doctrine states that "an employer normally shielded from tort liability may become liable to an employee if the employer has a second capacity that imposes obligations independent of those imposed as an employer."[15] In order to justify a common law action against an employer under the dual capacity doctrine, an injured employee must show that the employer acted in one of the following eight capacities:

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9. 180 Minn. 470, 231 N.W. 233 (1930). In *Boek*, the Minnesota Supreme Court recognized for the first time an exception to the exclusivity provision of the Workers' Compensation Act found now at Minnesota Statutes section 176.031 (1986). The court has referred to this exception as the "intentional tort exception." Kaess v. Armstrong Cork Co., 403 N.W.2d 643, 644 (Minn. 1987). This is currently the only exception to the exclusivity provision that Minnesota recognizes.

10. *Boek*, 180 Minn. at 470, 231 N.W. at 233.

11. *Id.* In the process of the attack, the plaintiff tried to protect himself by holding up his hand to protect his head. The defendant struck the plaintiff's hand, dislocating two of plaintiff's finger joints.

12. *Id.* at 471, 231 N.W. at 234. The *Boek* court stated:

> An employer who intentionally and maliciously inflicts bodily injuries on his servant should occupy no better position than would a third party not under a compensation act, and should not be heard to say, when sued at law for damages, either that the injury was accidental or that it arose out of the employment. . . . As between employer and employee wilfully [sic] and intentionally inflicted bodily injuries should neither be regarded as accidental nor as giving occasion for the application of the compensation act either for recovery or defense.

Id. at 471-72, 231 N.W. at 234.

13. *See id.*

14. *See, e.g.*, *Dual Capacity Doctrine*, *supra* note 4, at 560-81. The dual capacity doctrine has been designed to correct the anomaly of an employer shielding itself from tort claims which arguably do not arise from the employment relationship via the exclusivity provision. *Id.*

15. Terveer v. Norling Bros. Silo Co., Inc., 365 N.W.2d 279, 281 (Minn. Ct. App. 1985).

1. Manufacturer or distributor of a defective product;
2. Provider of medical services;
3. Insurer;
4. Corporate subdivision or related corporation;
5. Government subdivision;
6. Owner of real estate;
7. Vendor; or
8. Statutory duty not imposed by Workers' Compensation Act.[16]

The concept underlying the dual capacity doctrine is that where an employer acts in a second capacity unrelated to that of an employer, and the employee is injured by some act of this second capacity, then the exclusivity provision is not valid as a bar to common law claims for damages related to the injury.[17] Accordingly, a plaintiff should not be barred from a common law claim merely because she happens to be the tortfeasor's employee.[18]

In *Egeland v. State*,[19] the Minnesota Supreme Court was faced with the issue of whether or not to recognize the dual capacity exception to the exclusivity provision of the Workers' Compensation Act.[20] The court in *Egeland*, however, declined to recognize this exception.[21] The *Egeland* decision is important as it strongly indicates that Minnesota will probably never recognize the dual capacity doctrine.

III. FACTS OF *EGELAND V. STATE*

On December 20, 1983, plaintiff Walter Egeland and an assistant court administrator, Roberta Brandt, were traveling in plaintiff's car.[22] The plaintiff was a county court judge for both Lake and Cook counties of Minnesota.[23] At the time of the accident, plaintiff was returning to Two Harbors after holding traffic court in Silver Bay, Minnesota.[24] The accident occurred when plaintiff's vehicle collided with a snowplow owned by the State of Minnesota and operated by its employee, Keith Olsen.[25] The plaintiff suffered severe injuries as a result of the collision.[26]

16. *See Workers' Compensation*, *supra* note 4, at 815-16. By suing an employer based upon one of these eight relationships which are distinct from the employee-employer relationship, the exclusivity-remedy provision can be avoided and the plaintiff can bring suit under the common law.
17. *See* Note, *supra* note 1, at 821.
18. *Id.*
19. 408 N.W.2d 848 (Minn. 1987).
20. *Id.* at 849.
21. *Id.* at 851.
22. *Id.* at 849.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* The plaintiff suffered from severe multiple internal injuries, an aortic tear, fractured dislocations of both hips, bilateral tibial plateau fractures, and a frac-

The plaintiff commenced a lawsuit against Keith Olsen alleging negligent operation of the snowplow.[27] Suit was also brought against Olsen's employer, the State of Minnesota, as the plaintiff claimed the state was vicariously liable.[28] The district court dismissed the suit on the grounds that the plaintiff was, as a matter of law, a state employee.[29] As an employee of the state, the exclusive remedy provision barred the plaintiff from suing his employer in tort.[30] The Minnesota Court of Appeals certified the matter to the supreme court.[31]

IV. History of the Dual Capacity Rule in Minnesota

The first Minnesota case to address the dual capacity doctrine in a strict products liability case was the Hennepin County District Court case of *Netherland v. Acme Tag Co.*[32] In *Netherland*, the plaintiff was injured by a machine which was manufactured by the defendant-employer.[33] The district court judge, noting that Minnesota had no case law on point, ruled that the plaintiff's action was not within the dual capacity doctrine and as such was barred by the exclusivity provision of the Workers' Compensation Act.[34]

The Minnesota Court of Appeals also grappled with the dual capacity doctrine in *Terveer v. Norling Brothers Silo Co.*[35] The injured plaintiffs in *Terveer* claimed that their employer was also the manufacturer of the scaffolding which was responsible for their injuries.[36] The court determined, however, that the employer was not in the business of manufacturing or distributing the scaffolding.[37] Accordingly, the facts of the case did not fit within the dual capacity doc-

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ture to the mid-thorasic spine. The plaintiff endured six operations and was hospitalized for 110 days. Consequently, the plaintiff suffered permanent disabilities and was forced to retire on October 31, 1984. *See* Appellant's Brief, *supra* note 6, at 4.

27. *Egeland*, 408 N.W.2d at 849-50.

28. *Id.*

29. *Id.* at 850.

30. *Id.*; *see also* Minn. Stat. § 176.031 (1986).

31. *Egeland*, 408 N.W.2d at 849.

32. No. 753534 (Minn. 4th Dist. Ct. Apr. 13, 1979) (cited in Note, *supra* note 4, at 829).

33. *Id.* The plaintiff received workers' compensation benefits for his injuries. Later, the plaintiff also attempted to sue the defendant-employer under the dual-capacity doctrine exception. *See* Note, *supra* note 4, at 829.

34. *Id.* The district court, Judge Barbeau presiding, looked to the reasoning in Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977) for guidance. Judge Barbeau adopted the *Douglas* court's reasoning and held that the present claim was barred by the exclusive-remedy provision. *Id.*

35. 365 N.W.2d 279 (Minn. Ct. App. 1985).

36. *See id.* at 280; *see also supra* note 16 and accompanying text.

37. *Terveer*, 365 N.W.2d at 282.

trine.[38] The court noted, "this is not the proper case to consider application of the dual capacity doctrine."[39]

In *Kaess v. Armstrong Cork Co.*,[40] the heirs of Arthur Kaess brought a wrongful death action against the manufacturers and sellers of insulation containing asbestos, including Kaess' employer, MacArthur Company.[41] The company moved for partial summary judgment based on the exclusivity provision of the Workers' Compensation Act.[42] The *Kaess* court adopted the view of Professor Arthur Larson who has stated that "the 'dual capacity' doctrine is particularly unjustifiable in products liability cases because the employer's obligation to provide a safe workplace and a manufacturer's duty to provide a safe product are closely related."[43] Further, the supreme court held that "even if the 'dual capacity' doctrine were to be recognized in Minnesota, it would not in this case permit a suit against MacArthur."[44]

The history of the dual capacity issue in Minnesota reveals that no court up to the point of *Egeland* had ever explicitly accepted or rejected the doctrine. In fact, up to *Egeland*, the question was still open as to whether Minnesota would join other jurisdictions which had already recognized the dual capacity exception to the exclusivity provision.

V. Does *Egeland* Close the Door on the Dual Capacity Exception?

The Minnesota Supreme Court in *Egeland* was faced head on with the issue of whether or not it would recognize the dual capacity doctrine.[45] In its analysis of the issues, the supreme court referred to the doctrine as "generally discredited."[46] The court quoted with approval the following from an Alaska Supreme Court decision:

> Whatever frail vitality the dual capacity doctrine has in other juris-

38. *Id.*
39. *Id.*
40. 403 N.W.2d 643 (Minn. 1987).
41. *Id.* at 643-44. Arthur Kaess worked for 32 years for the MacArthur Company. The company was a contractor, distributor and manufacturer of insulation products. The insulation products manufactured by MacArthur contained asbestos fibers. In 1973, the use of asbestos in these insulation products was prohibited by statute. Kaess developed lung cancer from exposure to asbestos and cigarette smoking, and died in 1984. Workers compensation benefits paid a total of $201,500 to Kaess and his family. *Id.* at 644.
42. *Id.* at 643.
43. *Id.* at 645. (citing A. Larson, The Law of Workmen's Compensation § 72.83, at 14-245).
44. *Id.*
45. *Egeland*, 408 N.W.2d at 851.
46. *Id.*

> dictions, we do not think that it warrants adoption here. To do so might undermine extensively the policy sought to be achieved by the workmen's compensation act. There are endlessly imaginable situations in which an employer might owe duties to the general public, or to non-employees, the breach of which would be asserted to avoid the exclusive liability provision of our statute. It would be an enormous, and perhaps illusory, task to draw a principled line of distinction between those situations in which the employee could sue and those in which he could not. The exclusive liability provision would, in any event, lose much of its effectiveness, and the workmen's compensation system as a whole might be destablized. For these reasons, and because of the persuasiveness of case law from other jurisdictions rejecting it, we reject the dual capacity doctrine as the law of this state.[47]

The *Egeland* court then stated that "[f]or the reason so well stated in [the Alaska case] we decline to adopt the 'dual capacity' doctrine in this case."[48] While the holding in *Egeland* purports to limit itself to that particular case, the adoption of the above language from the Alaska case quite clearly denotes a broader expanse.

VI. CONCLUSION

Even though Minnesota courts have never explicitly adopted or rejected the dual capacity doctrine, the *Egeland* case seems to effectively foreclose the dual capacity exception to the exclusive remedy provision of the Workers' Compensation Act. Evidence of this conclusion can be found in the following quote by the court: "The district court declined to adopt the 'dual capacity' doctrine, and, under the facts of this case, *we also refuse to recognize the 'dual capacity' doctrine as an exception to section 176.031.*"[49] Further, the strong language embraced by the Minnesota Supreme Court from the Alaska case conclusively states that the dual capacity rule will not be recognized because "[t]o do so might undermine extensively the policy sought to be achieved by the workmen's compensation act."[50] Accordingly, the issue of whether Minnesota will recognize the dual capacity exception appears to be foreclosed by the strong language of the *Egeland* decision.

47. *Id.* (quoting State v. Purdy, 601 P.2d 258, 260 (Alaska 1979)).
48. *Id.*
49. *Id.* (emphasis added).
50. *Id.* (quoting *Purdy*, 601 P.2d at 260 (Alaska 1979)).

Employment Law: MINNESOTA ADOPTS THE "PUBLIC POLICY" EXCEPTION TO THE AT-WILL DOCTRINE: *Phipps v. Clark Oil & Refining Co.*, 408 N.W.2d 569 (Minn. 1987).

I. INTRODUCTION

In *Phipps v. Clark Oil & Refining Co.*,[1] the Minnesota Supreme Court, for the first time, recognized the public policy exception to the employment-at-will doctrine,[2] and further refined the analysis of defamation actions arising out of employment.[3] The *Phipps* decision represents a change in the legal relationship between employers and employees in Minnesota. In *Phipps* the court relied on recently enacted legislation as the basis for modifying the employment-at-will doctrine.[4] The court's use of the statute, however, in fashioning an analytical structure for public policy cases is troubling because it appears to have subtly changed the burden of proof required to make a prima facie case away from that intended by the plain meaning of the statute.[5]

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1. 408 N.W.2d 569 (Minn. 1987).

2. *See id.* at 571. Under the at-will doctrine, employment "may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge." Skagerberg v. Blandin Paper Co., 197 Minn. 291, 302, 266 N.W. 872, 877 (1936). The Minnesota Supreme Court has followed the modern trend in recognizing exceptions to the at-will doctrine. *See, e.g.*, Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 887-88 (Minn. 1986) (recognizing defamation in wrongful discharge situations); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983) (recognizing an implied-in-fact contract exception); *see also* Comment, *Employment Defamation Expands Employer Liability in the At-Will Context*, 13 WM. MITCHELL L. REV. 585 (1987) (explaining the development of exceptions to the doctrine in Minnesota, particularly focusing on defamation claims).

The public policy exception is the most widely accepted modification of the at-will doctrine. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931 (1983). Three-fifths of the states recognize a wrongful discharge cause of action. *Phipps*, 408 N.W.2d at 571. At least 25 states have recognized a public policy exception. *See* Phipps v. Clark Oil & Refining Co., 396 N.W.2d 589, 591 n.2 (Minn. Ct. App. 1986).

The fundamental rationale underlying the public policy exception is the idea that employers should be constrained from discharging employees for taking actions in conformance with the law. Note, *supra* at 1936. Generally, courts have applied the exception to three fact situations: termination for refusal to commit an unlawful act (refusing to lie under oath); for performance of a public service (jury duty); or for exercising a statutory right or privilege (filing a worker's compensation claim). *Id.* at 1937 n.49-52.

3. 408 N.W.2d at 573-74. *See generally* Comment, *supra* note 2.

4. MINN. STAT. § 181.932 subd. 1(c) (1987). *See also infra* notes 27-29 and accompanying text.

5. *See infra* notes 29-35 and accompanying text (discussing the burdens of proof required under the statute and *Phipps*).

II. FACTS

Mark Phipps was employed by Clark Oil as a cashier in a self-service gas station. On November 17, 1984, a handicapped customer asked Phipps to put leaded gas into a car equipped to operate on unleaded gas. Phipps was willing to pump unleaded gas into the vehicle, but refused to pump leaded gas, believing that to do so was a violation of the law.[6] The station manager directed Phipps to pump leaded gas into the car. When Phipps refused to do so, the station manager immediately fired him. Later, in response to an investigation by the Minnesota Pollution Control Agency, Clark Oil management stated that Phipps was fired because he "may have refused to provide full service to a handicapped customer."[7]

Phipps filed suit in September, 1985, alleging wrongful termination and defamation.[8] Clark Oil moved for judgment on the pleadings. The trial court granted the motion, stating that because Phipps was an at-will employee he could be discharged for any reason.[9] The court of appeals, relying on dicta in *Hunt v. IBM Mid America Employees Federal Credit Union*[10] and *Lewis v. Equitable Life Assurance Society*,[11] recognized a public policy exception to the at-will doctrine. The court, reasoning that "important societal interests oppose an employer's conditioning employment on required participation in unlawful conduct," found that "[a]n employer's authority over its employee does not include the right to demand that the employee commit a criminal act."[12] The court then analyzed the Federal Clean Air Act[13] to determine whether pumping leaded gas into the car would have violated the law.[14] Finding that such an act would be a violation of the law, the court of appeals reversed and remanded for a trial on the merits.[15] The supreme court's decision, unlike that of the court of appeals, did not discuss the policy reasons for recognizing the public policy exception.[16] Instead, the court simply noted

6. *Phipps*, 408 N.W.2d at 570.

7. *Phipps*, 396 N.W.2d at 594.

8. *Phipps*, 408 N.W.2d at 570.

9. *Phipps*, 396 N.W.2d at 589-90. Because Clark Oil asserted a qualified privilege defense to the defamation action, Phipps moved to amend the complaint to allege malice. The trial court also denied that motion. *Phipps*, 408 N.W.2d at 570. In affirming the court of appeals' reversal and remand, the supreme court directed that the trial court grant Phipps' motion for leave to amend the complaint. *Id.* at 574.

10. 384 N.W.2d 853, 858-59 (Minn. 1986).

11. 389 N.W.2d 876, 893-96 (Minn. 1986) (Kelly, J., dissenting); *see also Phipps*, 396 N.W.2d at 590, 593.

12. *Phipps*, 396 N.W.2d at 592.

13. 42 U.S.C. §§ 7401-7642 (1983).

14. *Phipps*, 396 N.W.2d at 593-95.

15. *Id.* at 595.

16. *Compare Phipps*, 396 N.W.2d at 591-93 *with Phipps*, 408 N.W.2d at 571.

the passage of the statute and affirmed the decision of the court of appeals.[17]

III. Analysis

While the major impact of the *Phipps* decision is its recognition of a public policy exception to the at-will doctrine,[18] the court also used the case to further refine the analysis of employment defamation claims. Phipps alleged that he was defamed when Clark Oil told state admininstrative personnel he was discharged for refusing service to a handicapped person.[19] The court held that the statement was one in which there could possibly be a defamatory meaning and therefore, judgment on the pleadings was not appropriate.[20] The court of appeals recently interpreted this aspect of the *Phipps* decision as meaning that judgment on the pleadings is not proper if the statement is "reasonably susceptible of a defamatory meaning."[21] The most troubling aspect of *Phipps*, however, is its analysis of public policy wrongful discharge cases.

Clark Oil argued that the courts should leave revision of the at-will doctrine to the legislature.[22] Noting that the legislature had enacted

17. *Phipps*, 408 N.W.2d at 571, 574.

18. *See infra* notes 22-37 and accompanying text. The *Phipps* court refused to allow punitive damages in the wrongful discharge action. In reaching the decision to withhold punitive damages, the court noted that other jurisdictions have done so in cases first recognizing this cause of action because "the employer could not have anticipated beforehand that the claim would even be actionable." *Phipps*, 408 N.W.2d at 573. In view of the court's holding that the Clean Air Act embodies a clearly mandated public policy which even protects whistleblowers, this result is inexplicable. *See infra* text note 26 accompanying note 26.

19. *Phipps*, 408 N.W.2d at 570; *Phipps*, 396 N.W.2d at 589, 594. *See supra* text accompanying note 7.

20. *Phipps*, 408 N.W.2d at 573. The court did not accept Clark Oil's argument, and the conclusion of the trial court, that Phipps acknowledged the truth of the statement in his complaint. Rather, the court found judgment on the pleadings inappropriate if the "statment may be defamatory if false." *Id.*

The court went to lengths to explain Phipps' contention that he had not refused to serve a customer because of the handicap. The court reiterated Phipps' allegation that "[a]t all times plaintiff was willing to dispense unleaded gasoline into the subject vehicle." *Id.* Despite the literal truth of Clark Oil's statement, the court said that where a statement could also have a defamatory meaning, judgment on the pleadings was inappropriate. *Id.*

21. Bohdan v. Alltool Mfg., Co., 411 N.W.2d 902, 907 (Minn. Ct. App. 1987). The plaintiff asserted that statements had been made which falsely implied his sexual preference was other than heterosexual. The plaintiff asserted that these statements were made in the workplace. Because "[t]he alleged actions and statements by the [defendants were] at least reasonably susceptible of a defamatory meaning," the court of appeals held that judgement on the pleadings was not appropriate. *Id.* at 904. The case is also notable for its recognition of a cause of action for negligent infliction of emotional distress arising out of the defamation action. *Id.* at 909.

22. *Phipps*, 408 N.W.2d at 570-71. *See also Hunt*, 384 N.W.2d at 859 (citing Mar-

legislation incorporating the public policy exception,[23] the supreme court rejected the argument.[24] The court stated that "[t]he only question that remains is whether we should . . . [apply the] public policy exception to the November 17, 1984, discharge of Phipps."[25]

The *Phipps* court found "[t]he Clean Air Act . . . [represents a clear] public policy to protect the lives of citizens and the environment."[26] The court held "that an employee may bring an action for wrongful discharge if that employee is discharged for refusing to participate in an activity that the employee, in good faith, believes violates any state or federal law or rule or regulation adopted pursuant to law."[27] The court's adoption of the language of the statute in its holding would lead one to believe the court was, in effect, giving the statute prospective effect.[28] A comparison of the statute with the analytical structure of public policy cases set out in *Phipps*, however, belies that belief.

The *Phipps* court adopted the shifting burden of proof standard suggested by the court of appeals for public policy cases.[29] To make out a prima facie case of wrongful discharge in contravention of public policy, the employee must demostrate that the discharge was motivated by the employee's good faith refusal to violate a clearly mandated public policy.[30] The burden then shifts to the employer to show that the dismissal was for reasons other than those asserted by the employee.[31] The ultimate burden, then, is on the employee to demonstrate that the discharge was for an impermissable reason.[32] Before setting out this analytical structure, the court analyzed the Clean Air Act to determine if Phipps would, in fact, have violated the law if he had pumped leaded gas into the car.[33] It is this aspect of

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rinan, *Employment At-Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155, 200 (1984) (advocating that courts not act until legislation is enacted which provides a clear standard of liability and provides a mechanism for dispute resolution).

23. *See* MINN. STAT. § 181.932 (1987). The statute also requires employers to give a true reason for termination to a discharged employee and bars defamation actions based on that statement. *Id.* § 181.933 (1987).

24. *Phipps*, 408 N.W.2d at 571.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 569. *Phipps* was decided on June 26, 1987. The effective date of the statute was August 1, 1987. *See* MINN. STAT. § 645.02 (1986) (effective date of legislation is August 1 unless the legislation itself indicates otherwise).

29. *Phipps*, 408 N.W.2d at 571-72. This three-step process is that used in Title VII actions. *Id.* at 572.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Phipps*, 408 N.W.2d at 571. *See* 40 C.F.R. § 80.22(a) (1984) (regulation promulgated under the act which prohibits the introduction of leaded gasoline into

the court's analysis that is most troubling.

The focus on whether or not the law would actually have been violated shifts the inquiry away from the analysis indicated by the statute. The statute proscribes termination of an employee who refuses to take an act "the employee, in good faith, *believes*"[34] violates public policy. The court appears to have shifted its analysis away from whether or not the employee believes the act is a violation of public policy, to an analysis of whether the refusal is a "*good faith refusal* to violate the law."[35] That this is more than a semantic difference is demonstrated in the recent court of appeals case *Freidrichs v. Western National Mutual Insurance Co.*[36]

In *Freidrichs*, the plaintiff alleged that he had been discharged for doing his job in compliance with the law.[37] Freidrichs was a pressure vessel inspector for Western. He alleged he was fired for refusing to refrain from reporting violations of American Society of Mechanical Engineers (ASME) safety standards.[38] Following the analysis set out in *Phipps'* the court of appeals analyzed the statute on pressure vessel inspections to determine whether Freidrich's actions were in compliance with the statute.[39] Finding that if his allegations were true, Freidrichs had acted in compliance with the statute, the court of appeals reversed the grant of summary judgment and remanded the case to the trial court.[40]

In both *Phipps* and *Freidrichs*, the courts analyzed statutes to determine whether the plaintiff's actions *actually* complied with the law. The new legislation does not appear to require an employee's refusal to perform an act be in actual compliance with the law. Rather, the plain meaning of the statute allows an employee to refuse to perform

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cars designed for unleaded by retailers or their employees). Clark Oil argued that the Clean Air Act's remedies were sufficient to protect Phipps. *See* 42 U.S.C. § 7622 (protecting employees from retaliatory discharge who, at the direction of their employers, violate the law and then report the violation). The court of appeals, after a brief analysis, decided the Act's remedies were not exclusive. *Phipps*, 396 N.W.2d at 593. The supreme court skirted the issue, pointing out that the federal statute was designed to protect the employee "whistleblower," but did not provide protection to the employee who simply refused to perform the illegal act. The court reasoned that to protect the employee who performed the illegal act, and not the employee who refused to act illegally, was illogical. *Phipps*, 408 N.W.2d at 571.

34. MINN. STAT. § 181.932 subd. 1(c) (1987) (emphasis added).

35. *Phipps*, 408 N.W.2d at 572 (emphasis added). An analysis of the statute might be appropriate to determine if the belief was reasonable. The statute does not, however, require that the belief be reasonable, only that it be a good faith belief. *See supra* note 34 and accompanying text.

36. 410 N.W.2d 62 (Minn. Ct. App. 1987).

37. *Id.*

38. MINN. STAT. § 183.59 (1984) (penalties for violations by inspectors). *Id.* § 183.60 subd. 1 (1984) (incorporates ASME standards into the law).

39. *Freidrichs*, 410 N.W.2d at 65-66.

40. *Id.*

an act which the employee *believes* is a violation of the law. The court's analysis, however, has shifted the inquiry away from whether the employee believes the action violates the law, to whether the act refused is, in fact, a violation of the law.

IV. CONCLUSION

It should be noted that both *Phipps* and *Freidrichs* arose before the August 1, 1987 effective date of the statute.[41] It is suggested here that the court will modify its analysis in cases which arise after August 1, 1987. Under the statute, the proper inquiry is into the employee's belief of what the law is, not into whether the employee's interpretation of the law is correct. In conformance with the statute, the court should make this modification of its analysis in public policy discharge cases. This small shift would bring the court's analysis in line with the statute.

Standing: MINNESOTA EXTENDS STANDING TO PROPERTY OWNERS' ASSOCIATION: *Regency Condominium Association v. State*, 410 N.W.2d 321 (Minn. 1987).

I. INTRODUCTION

> Any person having any estate, right, title, or interest in or lien upon any parcel of land, who claims that such property has been . . . [improperly assessed or taxed] may have the validity of the claim, defense, or objection determined by the district court . . . or by the tax court. . . .[1]

In *Regency Condominium Association v. State*,[2] the Minnesota Supreme Court reversed the tax court[3] and held that a condominium unit owners' association[4] has standing, granted by the statute above, to bring a single action challenging a county's taxation assessment valuation of each unit in the condominium.[5] The court based its decision

41. Mark Phipps was fired November 17, 1984. *Phipps*, 396 N.W.2d at 589. Charles Friedrichs was fired March 3, 1982. *Friedrichs*, 410 N.W.2d at 63.

1. MINN. STAT. § 278.01 subd. 1 (1986).

2. 410 N.W.2d 321 (Minn. 1987).

3. Regency Condominium Ass'n v. County of Ramsey, No. TA-1095 (Minn. T.C. July 2, 1986) (LEXIS, Sttax library, Minn. file).

4. As the court in *Regency* noted, under the Minnesota Uniform Condominium Act, MINN. STAT. ch. 515A (1986 & Supp. 1987), the unit owners' association manages the condominium. The court further noted that "membership in the association consists exclusively of unit owners, and all unit owners must belong to the association. MINN. STAT. § 515A.3-101 (1986). *Regency*, 410 N.W.2d at 322.

5. *Regency*, 410 N.W.2d at 324.

on the fact that, under the Minnesota Uniform Condominium Act,[6] the association has a statutory lien against all units for its annual assessments.[7] In its very brief opinion, however, the supreme court ignored issues which the tax court had raised below, and offered conclusory policy rationales to support its decision.

II. FACTS

The Regency Condominium Association filed a petition for review of Ramsey County's 1985 tax assessment valuations for each of the condominium's ninety-four separate units.[8] The Association attempted to file its petition on behalf of each of the condominium's ninety-four units, rather than on its own behalf.[9] The Ramsey County Clerk of District Court, therefore, required the Association to pay $3,008 —ninety-four times the normal $32 fee — to file its petition.[10] The Association paid the fee under protest and moved the tax court for a declaratory judgement.[11] In its motion, the Association requested a determination that it had standing to protest the assessments against each of the units and should therefore be allowed to file a single petition and pay only a single filing fee.[12]

After a hearing, the tax court entered its order denying the motion, ruling that the Association's "interest in the taxes assessed on each individual parcel is too remote to permit it standing to bring this petition in its own name."[13] The tax court also denied the Association's subsequent motion for a new trial or a judgement in its

6. MINN. STAT. ch. 515A (1986 & Supp. 1987).

7. *Regency*, 410 N.W.2d at 323. The lien is codified at Minnesota Statute section 515A.3-115(a) (1986), which states that "the association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes payable." *Id.*

8. *Regency*, 410 N.W.2d at 322. The Association filed its petition for determination pursuant to Minnesota Statute section 278.01 subdivision 1 (1986) (allows a petitioner to include more than one parcel of land in the same petition). *Regency*, No. TA-1095 (Minn. T. C. July 2, 1986).

9. *Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).

10. *See Regency*, 410 N.W.2d at 323 n.1.

11. *Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).

12. *See id.*

13. *Id.* In the memorandum accompanying its order, the tax court discussed Minnesota Statute section 515A.3-102(a)(4), which allows a condominium association to "institute, defend or intervene in litigation or administrative proceedings [in its own name] on behalf of itself or two or more unit owners on matters affecting the condominium." The court held, however, that the statute did not give the Association standing to challenge tax assessments on individual units for at least three reasons. First, the Association could not petition on its own behalf because it had no direct interest in the property tax. Second, since no two unit owners could join in a single petition "unless they share an interest in an individual parcel," the Association should not be able to petition "on behalf of two or more unit owners." Finally, the

favor.[14] The Association then appealed to the Minnesota Supreme Court.[15]

The supreme court decision reversing the tax court was unanimous.[16] The court commenced its opinion with a review of condominium law and a citation to subdivision (a) (4) of Minnesota Statutes section 515A.3-102, which empowers an owners' association to represent itself, or two or more unit owners, in legal proceedings.[17]

Without discussing whether the statute gave the Association standing in this action because it represented itself, or because it represented "two or more unit owners in a matter affecting the condominium,"[18] the court simply stated that section 515A.3-102(a)(4) makes the Association "a proper party to request adjudication of the claim that the condominium has been unfairly assessed."[19] Having summarily disposed of the problem of standing, the court went on to discuss the Association's right to request review of ninety-four separate assessments in one petition.

In this section of its opinion, the court looked to both section 278.01 of Minnesota Statutes, which authorizes "an action to determine the validity of a defense or objection to a tax on land,"[20] and to section 278.02, which allows a single petition to challenge the tax on more than one parcel,[21] to determine whether the Association met the requirements to maintain its action.[22] The court then turned immediately to the statute creating a lien in favor of the unit owners' association for unpaid assessments.[23] The court held that "the association, as the holder of a lien on each parcel of the condominium, has standing it in its own right to bring an action" challenging the tax assessment.[24]

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court held that taxes on the individual units in no way affected the condominium as a whole. *Id.*

The tax court further ruled that the Association's statutory lien for assessments did make it

> possible that the association will obtain title to a unit by foreclosure because of non-payment of the assessment for which it has a lien. But, that chance is too remote and speculative to be an "interest" or "lien" that the legislature contemplated protecting when it enacted Section 278.01.

Id.

14. *See id.*
15. *See Regency*, 410 N.W.2d at 322.
16. *See id.* at 321.
17. *Id.* at 322.
18. MINN. STAT. § 515A.3-102 (a)(4) (1986).
19. *Regency*, 410 N.W.2d at 322.
20. MINN. STAT. § 278.01 (1986).
21. *See id.* § 278.02 (1986).
22. *See Regency*, 410 N.W.2d at 323.
23. *See id.* (quoting MINN. STAT. § 278.01 subd. 1).
24. *Regency*, 410 N.W.2d at 323.

In the last section of its opinion, the court criticized the tax court's analysis of the issue of standing.[25] The court stated that a "vital interest" is not the exclusive requirement for standing in an action.[26] The court went on to explain that a party claiming to have standing pursuant to a statute need not establish the vitality of its interest — it need only meet the requirements of the statute.[27] The court was satisfied that the Association's status as a lienor[28] was sufficient to meet the statutory requirement to challenge the tax assessment, even if the probability that the Association would ever assert its lien was slight.[29]

III. Analysis

At the end of its opinion, the court set out what may have been the primary basis for its reversal of the tax court:

> Where, as here, the parcels are unquestionably related to each other and justice, as well as judicial economy, is served by determining objections to the taxation of the entire condominium in one proceeding, we see no reason to impose qualifications beyond those imposed by the legislature.[30]

Although the court's statement reads well, scrutinizing the holding more closely reveals several possible flaws. First, the separate units of a condominium are obviously related to each other through their status as a condominium. The court, however, did not directly address the tax court's contention that "each unit [of a condominium] . . . constitutes for all purposes a separate parcel of real estate."[31] Moreover, although the statute does allow a petitioner to challenge the assessments of more than one parcel if "the petitioner has an estate, right, title, interest, or lien"[32] in or on the parcel, the supreme court in *Regency* relied exclusively on an obscure statutory lien,[33] which the tax court characterized as "remote and specula-

25. *See id.*
26. *See id.*
27. *See id.* at 323-24. In *Regency*, the supreme court quoted approvingly from a United States Supreme Court case on standing in which the Court affirmed a decision that the Sierra Club lacked standing to challenge commercial development in a national game refuge. The quotation explains the difference between the common law concept of standing, which requires a "personal stake in the outcome of the controversy," and legislative standing, through which a party may be entitled by statute to maintain an action, even though the party lacks a "personal stake" in the action. *See Regency*, 410 N.W.2d at 323-24 (quoting Sierra Club v. Morton, 405 U.S. 727 (1972)).
28. The association is a "lienor" pursuant to Minnesota Statute section 515A.3-115(c) (1986).
29. *See Regency*, 410 N.W.2d at 323.
30. *Id.* at 324.
31. *See Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).
32. Minn. Stat. § 278.02 (1986).
33. *See* Minn. Stat. § 515A.3-115(a) (1986).

tive,"[34] to meet the standing requirement.[35]

Second, although the court claims that allowing the Association to file a petition on its own behalf promotes justice,[36] there is no indication in the opinion that denying standing would affect the rights of any party other than the Association.[37] The Association, however, claims standing pursuant to the statute precisely because it has no direct interest in the action.[38] As the tax court pointed out in its memorandum, the Association has no ownership interest in any of the condominium property and, unless it acquires a unit by purchase or foreclosure, it has no direct tax liability on any condominium property.[39] Furthermore, allowing the Association to file a single petition on behalf of each individual unit owner may work an injustice in favor of condominium unit owners over individual owners of other parcels of real property. Owners of other types of property are not likely to be able to challenge their tax assessments as cheaply and easily as a condominium association.[40] The extent to which justice is promoted is, therefore, questionable.

Finally, the court cites judicial economy as a consideration favoring the allowance of ninety-four challenges in a single petition.[41] On its face, this is a sound justification. Allowing an association to file a single petition in an effort to avoid having the tax court decide ninety-four individual petitions is certainly an appealing option. However, *Regency* is not likely to conserve as much judicial energy as the reduction of ninety-four petitions to one petition might indicate.

One reason the savings may prove to be illusory is the fact that, as a practical matter, it is extremely unlikely that each of the ninety-four unit owners in *Regency* would have filed a petition challenging the tax assessment.[42] Thus, the number of challenges actually avoided is something less than ninety-three. Furthermore, every condominium unit owners' association in Minnesota should now at least consider the option of filing a challenge.[43] *Regency* may, therefore, have the

34. *Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).

35. *See Regency*, 410 N.W.2d 321.

36. *Id.* at 324.

37. Each individual unit owner may still challenge a tax assessment pursuant to Minnesota Statute section 278.

38. *Cf. Regency*, 410 N.W.2d at 323 (stating that the Association has standing as a lienor, rather than as a matter of "right").

39. *See Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).

40. The condominium may be the only form of association of realty owners which meets the standing requirement to challenge a tax assessment.

41. *See Regency*, 410 N.W.2d at 324.

42. Many individual owners may not even be aware of their right to petition; and, for at least some of those who are aware, challenging the assessment may simply not be worth the expense and effort.

43. Even if an Association's challenge is weak, it will be relatively inexpensive to challenge the assessments, so might still be worth the effort.

effect of encouraging some challenges which would not have occurred before, and every new challenge chips away at the judicial economy rationale.

Regency would produce another inefficiency if "determining objections to the taxation of the entire condominium in one proceeding"[44] creates any significant practical problems for the tax court or the association. As the tax court emphasized in *Regency*, the condominium is not taxed as a single entity — each individual unit is assessed separately.[45] Challenging those separate assessments in a single action would put some associations in a very awkward position in relation to their individual unit owner members. In a condominium where the varying size, location, or market value of each individual unit makes uniform assessments inequitable, the association will have a difficult choice.

For efficiency, an association may choose to challenge the individual assessments in groups, based on such arbitrary or prearranged criteria as size and location. For example, the association may challenge the assesments of all one bedroom units in a certain building as a group, rather than disputing the assessment of each of those units separately. That grouping may be unfair to some owners, however, if the one bedroom units on the third floor have a higher market value than similar units on the first floor of the same building.[46] Conversely, the association which chooses to challenge each individual assessment separately, as the owner would do in an individual proceeding, will be in the undesirable position of having to argue the relative values of its own member units. The complexity of that potential conflict of interest is impressive.[47]

One more problem which could reduce *Regency's* effectiveness in promoting judicial economy is the possibility that a dissenting or dissatisfied individual unit owner might want to challenge an association's action, or escape the results of that action.[48] In fact, as the tax court pointed out in its memorandum, section 278.05 of Minnesota

44. *Regency*, 410 N.W.2d at 324.

45. *See Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).

46. For a discussion of a closely analogous problem, *see* Note, *Common Rights and Obligations Among Unit Owners Under the Minnesota Uniform Condominium Act*, 10 WM. MITCHELL L. REV. 157 (1984).

47. *Cf. id.* (discussing equitable distribution of rights and obligations to parties with differing interests in the condominium).

48. A dispute between two parties who are eligible to challenge the same tax assessment would present an interesting conflict because the statute gives no guidance at all on which party would be entitled to decide whether to maintain or drop the challenge. And, the only case other than *Regency* on a party's rights under Minnesota Statute section 278.01 is International Harvester Co. v. State, 200 Minn. 242, 274 N.W. 217 (1937), in which the court held that a lessee who was contractually bound to pay the property tax had an interest sufficient to give standing to challenge the tax assessment.

Statutes now allows the tax court to lower or *raise* a challenged assessment,[49] which makes dissatisfied unit owners a more likely possibility.

IV. CONCLUSION

The Minnesota Supreme Court's decision in *Regency* was based on a defensible reading of both the Condominium Act and the statute allowing property tax challenges; and the court might reasonably have considered and rejected each of the contentions raised in this summary and in the tax court's decision.[50] But the court allowed several questions to remain unresolved when it failed to address them in its opionion.

After *Regency Condominium Association v. State*, every condominium association in the state of Minnesota should at least consider routinely challenging the state's annual assessment valuations of the condominium's individual units. If its owners are aware of the potential practical problems and are willing to take the risk that their taxes will be raised,[51] they can pursue the single challenge very economically, through their assoication.

Uniform Commercial Code: MINNESOTA REFINES THE *SUPERWOOD* DOCTRINE FOR RECOVERY OF ECONOMIC DAMAGES IN COMMERCIAL TRANSACTIONS: *Valley Farmers' Elevator v. Lindsay Brothers Co.*, 398 N.W.2d 553 (Minn. 1987); *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987).

I. INTRODUCTION

In 1981, the Minnesota Supreme Court, in *Superwood Corp. v. Siempelkamp Corp.*,[1] held that "economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability."[2] Recently, the Minnesota

49. *See Regency*, No. TA-1095 (Minn. T.C. July 2, 1986).
50. *See id.*
51. *See* MINN. STAT. § 278.05 (1986).
1. 311 N.W.2d 159 (Minn. 1981).
2. *Id.* at 162. In *Superwood*, the plaintiffs' press broke down due to a weak cylinder wall which was found, after inspection, to be well below the required stress and safety specifications. The plaintiff brought suit in federal court alleging negligence, strict liability, breach of warranty, and breach of contract. The federal court certified three questions to the Minnesota Supreme Court in order to determine state law concerning whether economic losses arising out of a commercial transaction could be recovered under a negligence or strict liability theory. To preserve the Uniform

Supreme Court has addressed several questions left unresolved in the *Superwood* decision. In *Valley Farmers' Elevator v. Lindsay Brothers Co.*,[3] the supreme court adopted the predominant factor test[4] to determine whether, and under what circumstances, a hybrid commercial transaction involving both the sale of goods and the provision of services falls within the statutory provisions of the Uniform Commercial Code.[5] The *Valley Farmers'* court held that *Superwood* applies to hybrid commercial transactions which are predominantly a sale of goods.[6] Several months later, in *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*,[7] the Minnesota Supreme Court resolved the issue of whether the *Superwood* holding was limited to Uniform Commercial Code cases, or whether it applied to all commercial transactions.[8] The supreme court held that "commercial transactions," as that phrase is used in *Superwood*, means a transaction governed by the

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Commercial Code's effectiveness, the supreme court held in the negative, following the majority view. *Id.* at 161. *See generally* Note, *Recovery of Economic Loss in Commercial Transactions*, 9 WM. MITCHELL L. REV. 504 n.6, 8 (1983) (citing jurisdictions adopting the majority position).

Apparently, if a plaintiff suffers economic loss from personal injury and/or damage to other property, due to the defective product, then tort recovery for all damages would be allowed. *See* S.J. Groves & Sons, Co. v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 433 (Minn. 1985). In *S.J. Groves*, the plaintiff sued a helicopter manufacturer when the helicopter it purchased crashed due to an alleged defect which eliminated the pilot's ability to control the pitch of the rotor blades, preventing the helicopter from staying aloft. The defendant argued that the plaintiff's claim for economic loss under a negligence and strict liability theory was precluded by the *Superwood* decision. The federal district court certified the question to the Minnesota Supreme Court. The supreme court noted: "As we indicated in *Superwood*, as long as an individual seeks economic loss arising out of personal injury or damage to other property, recovery lies outside the realm of warranty and accordingly the losses are compensable in tort." *Id.* at 433. In *S.J. Groves*, however, the plaintiff was seeking economic losses due only to damage to the helicopter itself, although personal injuries arose from the same incident. The court continued: "What Groves seeks is recovery for the product's failure to live up to Groves' expectations as to its suitability, quality and performance - even if a tort injury arose out of the same occurrence, Groves did not suffer it, but lost only what it purchased." *Id.* at 434. The court also took into account the plaintiff's loss of a "nominal amount" of other property, including the loss of an aircraft radio and two pilot communication headsets, purchased separately and installed by the plaintiff. Relying on Minneapolis Society of Fine Arts v. Parker-Klein Assoc. Architects, Inc., 354 N.W.2d 816 (Minn. 1984), the court determined that the other property damage was "insufficient to bootstrap Groves' claims for tort recovery of all its damages." *S.J. Groves*, 374 N.W.2d at 434 n.2.

3. 398 N.W.2d 553 (Minn. 1987).
4. *See infra* notes 26-27 and accompanying text.
5. *Valley Farmers'*, 398 N.W.2d at 556.
6. *Id.* at 556-57.
7. 410 N.W.2d 312 (Minn. 1987).
8. *Id.*

Uniform Commercial Code, thus limiting *Superwood's* applicability.[9]

Both *Valley Farmers'* and *McCarthy Well* evidence the Minnesota Supreme Court's continuing attempt to preserve the integrity of the Uniform Commercial Code's remedy provisions, and reinforce the public policy need to protect the legitimate expectations of consumers.[10] As can be expected, the reality of these two decisions can be both harsh and kind. Where economic loss occurs *after* the Uniform Commercial Code's statute of limitations period has run, a plaintiff may have no cause of action to recover damages arising out of a Uniform Commercial Code transaction.[11] On the other hand, the *Superwood* rule can be used as a defense only in limited situations. Most importantly, consumers are not prevented by *Superwood* from relying on a tort cause of action to recover economic losses unrecoverable under Uniform Commercial Code or general common law contract principles.

This Casenote will focus on these two decisions as they provide further understanding of the *Superwood* decision and its underlying rationale. Particular attention will be given to the underlying conflicts evidenced by these recent supreme court decisions and to the court's reasonable attempt to balance those conflicts.

II. *VALLEY FARMERS' ELEVATOR V. LINDSAY BROTHERS CO.*

A. Facts

Valley Farmers' Elevator contacted Lindsay Brothers, a distributor of agricultural equipment and industrial supplies, to submit a proposal for a grain drying and storage system.[12] Lindsay Brothers ultimately installed the system at a cost of approximately $500,000.[13]

The system's function was for grain storage, but more importantly, its function was for retaining the stored grain in optimum condition.[14] To fulfill its purpose, the storage bins incorporated a negative flow aeration system.[15] Through the use of fans located at the

9. *Id.* at 315.

10. *See Superwood*, 311 N.W.2d at 161-62. The *Superwood* court stated:

> We, however, do not agree that the U.C.C. was intended to preempt the entire area of products liability. Strict products liability developed in large part to fill gaps in the law of sales with respect to consumer purchasers. Limiting the application of strict products liability to consumers' actions or actions involving personal injury will allow the U.C.C. to satisfy the needs of the commercial sector and still protect the legitimate expectations of consumers.

Id. at 162 (citations omitted).

11. *See infra* note 67 and accompanying text.

12. *Valley Farmers*, 398 N.W.2d at 554.

13. *Id.*

14. *Id.*

15. *Id.*

base of the system to draw air through the bins, the stored grain was kept dry and cool.[16] While the owner's manual recommended the installation of automatic controls, Valley Farmers' system was operated manually.[17]

Nearly four years after installation, the storage bins collapsed.[18] Apparently, one night after an employee turned the fans on, the exterior roof vents, which had accumulated frost due to an increase in humidity, prevented the free flow of air.[19] A vacuum occurred because no air could flow into the system from above while the pumps continued to draw air out from the base, resulting in the inward collapse of the roof and sides of the bin.[20] No damage occurred to the grain itself.[21]

Valley Farmers' sued Lindsay Brothers for negligence, failure to warn, and strict liability for damage to the storage bin.[22] The trial court granted Lindsay Brothers' motion for summary judgment, holding that *Superwood* precluded Valley Farmers' from recovering economic losses arising out of a commercial transaction under negligence or strict liability theories.[23] Valley Farmers' appealed and the court of appeals affirmed.[24] Adopting the predominant factor test, the supreme court upheld the court of appeals' decision.[25]

B. Court's Analysis

The supreme court found that the "substantial or predominant purpose of the contract here was the sale of goods, not the rendition of services,"[26] although Lindsay Brothers did provide design serv-

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 555.
23. *Id.*
24. *Id.*
25. *Id.* at 556; *see also infra* notes 26-27 and accompanying text. The court rejected Valley Farmers' attempt to distinguish their position from the defendants in *Superwood* and its progeny, on the ground that Valley Farmers' is a distributor rather than a manufacturer. The court stated:

> We reject the asserted manufacturer-distributor distinction, relying upon explicit language contained in Article 2 defining a "merchant," . . . and delineating a merchant's various rights and obligations. . . . In the doubtful event that the legislature had intended to except the class of "merchants" or distributors from the purview of Article 2 dealing with "transactions and goods," it would certainly not have comprehensively addressed that class' duties, rights and remedies.

Valley Farmers', 398 N.W.2d at 555 (citations omitted).
26. *Id.* at 556.

ices and select component parts.[27] These services, however, were found to be incidental to the transaction. The supreme court noted that any sale of goods generally requires incidental labor charges for converting "raw materials into a useful product [or] [t]hat some added service is required to install or apply the product. . . ."[28] Thus, while $120,000 of the full $500,000 contract price was related to Lindsay Brothers' provision of services, "that factor is not persuasive that the essence of the contract was the provision of services."[29] The court reasoned further that another "factor indicative of the tangential and incidental nature of those services" was that "no part of the labor charge included in the contract [was] designated as compensation for the defendant's alleged design of the system."[30]

Justice Yetka, in a dissenting opinion, refused to hold that the Uniform Commercial Code should govern Valley Farmers' cause of action.[31] He stated:

> However, I am willing to accept the logic that a commercial buyer complaining of a defect in a good, such as a piece of machinery or a storage bin, should be relegated to the U.C.C. rules designed to regulate the sale of goods uniformly. What is not clear, however, is that the U.C.C. rules should apply to the appellant's particular cause of action in this case; for the defect complained of here was not in a good sold, but in important design services that were neglected.[32]

The gravamen of Justice Yetka's argument was that it was inconsistent to hold that Valley Farmers' could purchase Lindsay Brothers' expertise, but not "sue on the basis of defects in this expertise."[33] Had outside architects been hired to design the storage bin, a cause of action for negligence against the architects would exist.[34] Finally, to analyze a commercial transaction on such a separated basis would not contravene the *Superwood* decision. *Superwood* "has not barred future courts from defining commercial transactions so as to exclude services aspects."[35] Furthermore, the Uniform Commercial Code was not intended to apply to transactions where "[a]n important part of the transaction was the sale of design abilities, which failed."[36]

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 557-58 (Yetka, J., dissenting).
32. *Id.* at 557.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 558.

III. *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*

A. Facts

As a result of increasing production volume, St. Peter Creamery wished to restore its artesian well to its original capacity.[37] The creamery contracted with McCarthy Well to increase the flow of water in its well.[38] McCarthy Well air-lifted sixty feet of sand from the well bottom and pulled a copper liner out of the well casing.[39] The flow of water still did not increase, until after McCarthy Well detonated several dynamite charges at the bottom of the well cavity.[40] McCarthy Well later completed the installation of a turbine pump which it recommended to the creamery.[41] McCarthy Well billed St. Peter Creamery for nearly $35,000, which included the cost of the new turbine at approximately $8,500.[42] After St. Peter Creamery made only partial payment, McCarthy Well commenced suit to recover the balance.[43] The creamery counterclaimed, alleging negligence and misrepresentation.[44]

Both parties were found negligent. McCarthy Well was found liable for seventy-five percent of the $190,000 in damages sought by the creamery.[45] McCarthy Well appealed, arguing the *Superwood* decision precluded St. Peter Creamery from recovering its economic losses under a negligence theory.[46] The Minnesota Court of Appeals held that *Superwood* did not prevent the creamery from recovering economic losses resulting from the negligent performance of services.[47] The supreme court affirmed.[48]

B. Court's Analysis

McCarthy Well based its argument on a literal reading of *Superwood*, which held that "economic losses that arise out of commercial transactions . . . are not recoverable under the tort theories of negligence or strict products liability."[49] McCarthy Well argued that *Superwood* applies to *all* commercial transactions, and that the

37. *McCarthy Well*, 410 N.W.2d at 313.
38. *Id.* at 314.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 313.
48. *Id.* at 315.
49. *Superwood*, 311 N.W.2d at 162.

doctrine was not limited only to Uniform Commercial Code cases.[50] Moreover, McCarthy Well argued that a similar rule had been applied equally to Uniform Commercial Code and non-Uniform Commercial Code services transactions in a majority of jurisdictions.[51]

The supreme court's analysis began with a review of the *Superwood* decision. Acknowledging that it had not expressly defined "commercial transaction" in that decision, the court noted: "A review of our decision in *Superwood* shows that, as used in *Superwood*, a 'commercial transaction' is a transaction governed by Article 2 of the Uniform Commercial Code, Minn. Stat. ch. 336 (1986)."[52] The court continued:

> The *Superwood* rule is premised on the existence of certain rights and remedies provided for in the U.C.C.: 'The U.C.C. clarifies the rights and remedies of parties to commercial transactions . . . To allow tort liability in commercial transactions would totally emasculate [the warranty and liability] provisions of the U.C.C.' The rationale behind the *Superwood* rule is that a recognition of tort actions in cases under the U.C.C. would upset the remedies contained in the U.C.C.; when the rationale is not applicable, i.e., when the U.C.C. does not apply, there is no reason for the *Superwood* rule to apply.[53]

The supreme court then expressly held that " 'commercial transaction,' as that phrase is used in *Superwood*, means a transaction governed by the U.C.C. When the U.C.C. does not apply, the transaction is not a 'commercial transaction,' and the *Superwood* rule does not apply."[54]

The court went on to apply the predominant factor test, adopted in *Valley Farmers'*, to the McCarthy Well - St. Peter Creamery transaction.[55] It concluded that the transaction was predominantly a provision of services.[56] The court looked to the work McCarthy Well performed to determine whether the transaction was a sale of goods, connected with the incidental provision of services.[57] Except for the sale of a turbine pump, the transaction, as a whole, strictly involved the provision of services.[58] The bill sent to St. Peter Creamery confirmed the court's analysis.[59] Of the total $34,573.27, only

50. *See* Brief for Appellant at 26-29, McCarthy Well Co., Inc. v. St. Peter Creamery, Inc., 410 N.W.2d 312 (Minn. 1987) (C6-85-1740).
51. *Id.* at 26.
52. *McCarthy Well*, 410 N.W.2d at 314.
53. *Id.* at 314-15 (citations omitted).
54. *Id.* at 315.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*

$8,329.45 was attributable to the sale of the new turbine pump.[60] Thus, the McCarthy Well - St. Peter Creamery transaction was not a "commercial transaction," as that phrase is used in *Superwood* because it was predominantly a provision of services.[61] As a result, *Superwood* did not bar the creamery from recovering its damages under a negligence theory.

III. Analysis

When the *Superwood* court adopted the rule preventing commercial plaintiffs from recovering economic losses arising out of transactions governed by the Uniform Commercial Code, it recognized the supremacy of the Code in governing commercial relationships. At the same time, in *Superwood* and its progeny, the court has recognized the Code's inability to fully protect the needs of the consumer.[62] In the *Valley Farmers'* and *McCarthy Well* decisions, the Minnesota Supreme Court has continued to fashion the general rule in such a manner that both the Code's supremacy and the consumer's legitimate expectations are maintained. Neither decision upsets or skews the general rationale underlying the *Superwood* decision.

The *Valley Farmers'* court followed at least twenty-one other states in adopting the predominant factor test.[63] In adopting this test, the supreme court's ruling consistently followed from earlier supreme court decisions involving the sale of goods.[64]

Still, Justice Yetka's dissenting opinion has some theoretical appeal. The sting of the majority's opinion illuminates his concerns. When Article Two of the Uniform Commercial Code applies, a timely action for breach of warranty must be commenced within four

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60. *Id.*

61. *Id.*

62. *See supra* note 2 (discussing personal injury and other property damage exceptions to the *Superwood* rule).

63. *See* Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R.4th 501, 506 (1981).

64. *See* O'Laughlin v. Minnesota Natural Gas Co., 253 N.W.2d 826 (Minn. 1977) (U.C.C. warranty applicable to product installations); Kopet v. Klein, 275 Minn. 525, 148 N.W.2d 385 (1967) (Uniform Sales Act warranty applicable to sale involving transfer of chattel and related service).

The *Valley Farmers'* court also followed the guidelines discussed in Bonebrake v. Cox Co., 499 F.2d 951 (8th Cir. 1974) to determine when a hybrid commercial transaction is governed by the Uniform Commercial Code. The *Bonebrake* court stated:

> The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is a rendition of service, goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g. installation of water heater in a bathroom).

Id. at 960 (footnotes omitted).

years after tender of delivery.[65] Where economic losses arise after the four year statute of limitations period expires, as was the case in *Valley Farmers'*, no cause of action exists to recover those economic losses. This result seems especially harsh when the damages arise due to negligent design services rather than a defect in the product provided. Generally, such services standing alone would not be governed by the Uniform Commercial Code remedies. Where a sale of goods is the thrust of the transaction, however, the negligent services are bootstrapped into the Code's remedial framework.

Nevertheless, the majority's opinion is fair and equitable. Statutes of limitations are not a new phenomena. While they can be harsh, at the same time they serve the necessary judicial function of preserving efficiency. In effect, statutes of limitation must act blindly in order to serve that function. These statutes do not distinguish between what may or may not be a "stale" claim.

Moreover, the majority opinion is the result of important public policy concerns. Valley Farmers' was a commercial plaintiff. The law assumes that a commercial plaintiff has substantially equal bargaining power with a seller, and that a commercial plaintiff can protect itself by negotiation.[66] A buyer can negotiate for a lower price by relieving the seller from the risk attributed to the responsibility for a defective product. Conceivably, a buyer can further protect itself by bargaining as to a product's actual specifications. In this situation, where "failure of coverage is attributable not to 'gaps' in consumer remedies that tort remedies should correct but, rather, to the plaintiff's conscious choice,"[67] the supreme court has rightfully refused to allow recovery in tort.

While *Valley Farmers'* is consistent in maintaining the supremacy of the Code in commercial transactions, *McCarthy Well* is equally consistent in its support of the legitimate expectations of consumers by refusing to extend *Superwood* beyond its applicable rationale. The *McCarthy Well* court specifically limits *Superwood* to transactions where commercial buyers and sellers can negotiate over the price of goods,

65. MINN. STAT. § 336.2-725 (1), (2) (1986).

66. *See S.J. Groves*, 374 N.W.2d at 434.

67. *Id.* A commercial buyer, however, cannot negotiate with a seller to extend the statute of limitations period beyond four years from tender of delivery. Generally, except where the Code expressly prohibits it, the parties to a contract may vary the effect of provisions of the Code by agreement, subject to the "obligations of good faith, diligence, reasonableness and care." MINN. STAT. § 336.1-1-2 (3) (1986).

Minnesota Statute section 336.2-725 (1) (1986) expressly prohibits parties to a contract from opting out of the four-year statute of limitations period. It provides:

> An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.

Id.

and negotiate whether the buyer or seller should bear the risk of liability due to a defective product. Adopting McCarthy Well's argument would have violated the *Superwood* rationale. This argument would mean that in any type of commercial transaction, including those involving only a sale of services or an incidental sale of goods, plaintiffs would be strictly precluded from recovering damages under a tort cause of action. A negligent defendant would be insulated from responsibility for its negligent acts.[68] For example, "if a business calls a plumber to install a toilet and the plumber in installing the toilet uses a torch and somehow carelessly burns down the building, there would be no recovery."[69] The *Superwood* court never intended to extend its decision into such an unsupportable position.

IV. Conclusion

Since *Superwood*, and as a result of its decision in *Valley Farmers'* and *McCarthy Well*, the Minnesota Supreme Court has implicitly delineated three types of categories of commercial transactions. The first category of commercial transactions involve the sale of goods only. The *Superwood* doctrine applies to this category of transactions. The second category of commercial transactions involves only the provision of services. The *Superwood* doctrine does not apply to this category of transactions. The third category of commercial transactions involves both the sale of goods and provision of services. The *Superwood* doctrine applies to this category of transactions only if, under the *Valley Farmers'* standard, the transaction is predominantly a sale of goods.

The Minnesota Supreme Court has refused to apply *Superwood* beyond its applicable rationale. In doing so, it has maintained the integrity of the *Superwood* doctrine. This refusal limits its potentially harsh results to only certain commercial transactions, in which commercial buyers and sellers are in equal position to bargain in order to mitigate those risks.

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68. *See* Brief for Respondent at 12-14, McCarthy Well Co., Inc. v. St. Peter Creamery, Inc., 410 N.W.2d 312 (Minn. 1987) (C6-85-1740).
69. *Id.* at 14.